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OCT 30, 1946

Nos. 77, 78

# In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

*v.*

WILLIAM M. DICKINSON

UNITED STATES OF AMERICA, PETITIONER

*v.*

F. H. WITHROW

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**BRIEF FOR THE UNITED STATES**

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### OPINION BELOW

The district court did not write an opinion. The opinion of the circuit court of appeals (R. 243–252) is reported at 152 F. 2d 865.

## JURISDICTION

The judgments below were entered on January 4, 1946 (R. 252, 255). The petition for writs of certiorari was filed on April 3, 1946, and was granted on May 13, 1946 (R. 257). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 23, 1925.

## QUESTIONS PRESENTED

1. Whether the right of a landowner to sue the United States for the taking of a flowage easement over lands within the pool area behind a dam accrues only when the pool is completely filled, as the court below held, or, instead, accrues (a) when the dam is first placed in operation, or (b) when the dam is substantially completed, actually in use, and capable of full operation.

2. Whether, when the United States takes part of a tract of land for improvement of navigation, the Fifth Amendment imposes an obligation to pay the costs of protecting the remainder of the tract against damage resulting from the use to which the United States puts the portion it has taken.

3. Whether the Fifth Amendment requires the United States to pay the full value of land which it inundates but which the owner subsequently reclaims by filling.

4. Whether construction of a dam capable of intermittently flooding certain lands imposes an

obligation to make compensation therefor if (a) there is no intention to flood those lands and it is shown that they will be flooded only if the plans for operating the dam are frustrated by circumstances beyond the control of the United States, and (b) there is no evidence as to frequency, duration or other characteristics of the intermittent floods.

## STATUTES INVOLVED

The pertinent provisions of Sec. 24 (20) of the Judicial Code, 28 U. S. C. 41 (20) and R. S. 3477, as amended, 31 U. S. C. 203, are set out in the Appendix, pp. 64–65, *infra*.

## STATEMENT

These suits were instituted in the District Court for the Southern District of West Virginia under Section 24(20) of the Judicial Code, 28 U. S. C. 41(20). The judgments under review (R. 252–253, 255–256) affirm judgments of the district court (R. 14–16, 29–31) awarding respondents the value of easements to flood permanently certain land and to flood intermittently other land, and awarding them, in addition, the estimated cost of unbuilt protective measures which, if constructed before the flooding, would have prevented erosion.

The respondents are the owners of lands at South Charleston, West Virginia, which border on the pool formed by the Winfield Dam in the

Kanawha River. The Kanawha flows for about 97 miles from its source to its confluence with the Ohio River. Prior to the initiation of the present projects, which involved the construction and operation of the Winfield Dam, ten locks and dams provided a channel six feet deep from the Ohio River to a point about 90 miles upstream. H. Doc. No. 190, 70th Cong., 1st sess., p. 2. As a result of preliminary examination and survey authorized by Section 12 of the Act of September 22, 1922, c. 427, 42 Stat. 1038, 1045, the Chief of Engineers recommended replacement of the upper four locks and dams by two other locks and dams. H. Doc. No. 190, p. 4. The Act of July 3, 1930, c. 847, 46 Stat. 918, 928, authorized the recommended improvement "with a view to providing a channel nine feet in depth." After preliminary examination and survey authorized by Section 4 of the Act of January 21, 1927, c. 47, 44 Stat. 1010, 1020, the Chief of Engineers recommended that, in order to provide a nine-foot channel throughout the Kanawha River, the remaining six dams in the Kanawha and three in the Ohio River should be replaced by a dam near Winfield, West Virginia, and another near Gallipolis, Ohio. H. Doc. No. 31, 73d Cong., 1st sess., pp. 2–4. The recommended improvement was authorized by the Act of August 30, 1935, c. 831, 49 Stat. 1028, 1035 (R. 38).

Pursuant to the Act of July 3, 1930, the United States erected the London and Marmet Dams.

These were completed before May 12, 1934. Both were upstream from respondents' properties and consequently did not change the water elevation there (R. 38). The Winfield Locks were completed at a cost of more than $2,000,000 (R. 177–178) before construction of the Winfield Dam was commenced (R. 170). They would have been useless without the Winfield Dam (R. 171). The Winfield Dam, constructed pursuant to the Act of August 30, 1935, was designed to impound water so as to raise the water elevation between it and the Marmet Dam, next upstream (R. 38). In order to provide a nine-foot channel between the Winfield and Marmet Dams under usual conditions, it is necessary to maintain the water at Winfield Dam at elevation 566 (R. 187, 188).[1]

Respondents' lands border on the pool formed by Lock and Dam 7 of the old series. That reach of the river is now included within the pool formed by Winfield Dam, which is situated approximately 22 miles downstream from respondents' lands (R. 23).

Prior to the construction of Winfield Dam, the pool level maintained at respondents' lands was at elevation 554.65 feet. Under date of July 1, 1936, those holding permits from the Secretary of War to maintain structures in this part of the river, the respondent Withrow among them,

[1] Elevations are those above mean sea level according to Sandy Hook datum.

were notified that the proposed pool elevation would be 566 feet and that the change in elevation probably would be made during the summer of 1937 (R. 223). Thus, a rise of 11.35 feet in the pool level at the properties involved was contemplated.

On October 21, 1936, six years and five months before these suits were filed (R. 3, 18), Winfield Dam was so far completed that on that day, with the aid of cofferdams, the water elevation at the dam was raised to 547 feet.[2] This rise submerged Lock and Dam No. 8, next downstream from Lock and Dam 7 (R. 20, 170). It did not, of course, inundate any of the lands here involved. The next rise on May 30, 1937,[3] was to elevation 556; it submerged Lock and Dam No. 7, and raised the water 1.35 feet at respondents' lands. At intervals thereafter until September 22, 1938, when the planned elevation of 566 feet was effected, the United States raised the water. On October 20, 1937, it went to 558 feet; on January 6, 1938, to 563.15 feet; on August 26 to 565; on September 1 to 565.5 and, as just stated, on September 22 to 566 (R. 22–23). Meanwhile, on August 20, 1937, the dam had been officially accepted by the United States (R. 38).

[2] The successive rises described in this paragraph are shown graphically on the chart in the Appendix.

[3] As is implicit in the record, the dam gates had been installed when this rise occurred.

Dickinson did not acquire his land until August 16, 1937, two and one-half months after the land which he bought had been flooded to elevation 556. It bordered the river for 411 feet and before the flooding contained approximately 3.1 acres (R. 37). Elevation of the water to 566 feet submerged 0.22 of an acre which, as of September 22, 1938, had a fair market value of $400 (R. 38–39). Withrow's land bordered the river for 180 feet. The rising water submerged 0.11 of an acre of his land, which had a fair market value, as of September 22, 1938, of $200 (R. 40–41).

During the later rises in the water and after attainment of the permanent pool level, there was considerable erosion of the river banks of respondents' properties (R. 39, 41). At Dickinson's place, from 5,000 to 7,000 cubic yards fell into the river, together with some 30 trees, and on top of the bank there developed a large crack which, extending through the foundation of the residence he was building, damaged it materially (R. 39). A substantial part of Withrow's river bank and about 20 trees fell into the stream and parts of the surface above the bank subsided from four to eight inches (R. 41). The erosion and damage were "due to saturation and softening of the soil and wave action thereon" and were the "direct and proximate" results of the permanent flooding of the 0.22 and 0.11 acre (R. 39, 41).

The damage and erosion could have been prevented by putting rock toe walls four and a half feet deep and six feet wide at the old pool level and installing stone riprapping with an average thickness of 18 inches from the toe wall up the river bank to elevation 569 feet before elevation of the pool by Winfield Dam. As of September 22, 1938, this work would have cost approximately $10.33 per lineal foot, $4,245.63 for the Dickinson property, and $1,859.40 for the Withrow property. In view of the character and value of the properties, the expenditure of these amounts would have been sound economy. (R. 39-40, 41.)

Under a permit secured from the Secretary of War early in 1940, Dickinson dumped 8,000 cubic yards of earth and 8,000 cubic yards of rock into the river along the bank partly to prevent further erosion (R. 61) and partly for beautification of his property (R. 78). Because of this work, all except 0.05 acre of the 0.22 acre originally submerged has been reclaimed (R. 39).

So far as the foregoing facts are concerned, the controversy between the parties is limited to questions of law. However, the trial court made findings which the Government contends are unsupported by evidence. The substance of those findings is as follows:

As the result of the manipulation of certain movable parts of the Winfield Dam, respondents'

lands lying between elevations 566 and 574 (0.10 of an acre belonging to Dickinson and 0.04 of an acre belonging to Withrow) will be flooded intermittently (R. 39, 40). The fair market value as of September 22, 1938 of easements intermittently to flood these lands was $75 in the case of Dickinson (R. 39) and $35 in the case of Withrow (R. 41).

The Government contends that these findings are without support in the record and that there is neither any evidence that the Government has taken such easements nor any evidence of their value. It is necessary, therefore, to summarize the pertinent parts of the record.

The claims were initiated by allegations in each complaint that the lands lying between elevations 566 and 574 were and would be subject to more frequent overflow than before the construction of the dam (R. 3, 18). To support these allegations, Dickinson testified that at various times government agents, none of whom he could name, had told him there would be intermittent flooding between these elevations (R. 66, 67), and that statements to the same effect had been made by the District Engineer in letters to him (R. 67). Government counsel, called by respondents, testified it was his recollection that in petitions to condemn flowage easements in the Winfield pool the Government had alleged that the land between elevations 566 and 574 would be flooded occasionally (R. 168). And it was stipu-

lated that the easement areas acquired by the United States on non-navigable streams in the vicinity of the Dickinson and Withrow properties extended to elevation 574 (R. 168). The respondents did not offer any evidence as to the frequency, duration, velocity or other characteristics of such overflows. When the trial court asked: "Is there any statement in the letters [just referred to] as to how often the intermittent flooding will occur?", respondents' counsel answered: "No sir, and we don't know. Nobody but the Government knows that, and we hope they will enlighten us on that. We do know that it will be intermittently flooded; they said it would be; we don't know how often." (R. 67.)

In support of its denial of the allegations of the complaint (R. 4, 20), the Government showed that the scheme for operating the dam did not call for intermittently overflowing any lands of respondents. It brought forward the following evidence:

Winfield Dam was constructed for the sole purpose of maintaining a channel nine feet deep between it and Marmet Dam (R. 187, 192). It cannot be used for flood control (R. 192). Under usual conditions, the requisite depth in the river is maintained by impounding water at the dam to elevation 566 (R. 187). However, this depth will be produced by a flow at the dam of 80,000 cubic feet per second (R. 192, 194). Conse-

quently, at such a flow the dam is withdrawn from operation (R. 187–188, 189). The withdrawal is effected in the following manner: When reports from any of the observation stations maintained by the Government in the watershed of the river indicate the approach to the dam of an 80,000 second feet flow (R. 188), the six gates of the dam are successively and progressively raised from the water according to a formula. The formula was devised so that the change from regulated to open river conditions might be made gradually (R. 187–188). By the time the flow at the dam has reached 80,000 second feet, all the gates are completely clear of the water, i. e., the dam has ceased to operate (R. 179, 188, 194). The pool at the dam is then at elevation 560, six feet less than its usual height (R. 189). Since the dam has ceased to operate, it has no effect on the river and is not the cause of any overflow (R. 190, 194).

The method of operating the dam calls for a reduction of the pool level at the dam as the flow in the river increases. However, in the event of a collapse in communications (R. 189) or breakdown of machinery (R. 194), it might happen that the reduction of the pool level could not be accomplished according to plan. In that event, 80,000 cubic second feet might have to be passed at elevation 566 (R. 189) and the water at respondents' lands would rise to elevation 574 (R. 194). But otherwise the gates would be completely out of the

water when the flow of 80,000 second feet arrived at the dam. At the time of the trial, there had been no failures or breakdowns (R. 189).

The district court's conclusions of law may be summarized as follows: A single cause of action accrued in each case (R. 42). This arose on September 22, 1938, when the water reached elevation 566 (R. 41). By construction and operation of old Lock and Dam 7 and the maintenance of the pool behind it at elevation 554.65 for more than 40 years, the Government acquired the right by eminent domain, adverse possession or prescription to maintain the water at that elevation at respondents' properties without liability (R. 41–42). Dickinson was not prevented from recovering compensation for the value of the land lying between elevations 554.65 and 566 by reason of the fact that it was submerged before he acquired title or because of the protective work subsequently done by him he reclaimed a part thereof. Dickinson was entitled to recover (a) $400 for the 0.22 of an acre permanently flooded, (b) $75 for the 0.10 of an acre intermittently flooded, (c) $4,245.63, as the reasonable cost on September 22, 1938, of work which would have prevented erosion, and (d) interest at the rate of six per cent per annum from September 22, 1938. But the entire recovery should not exceed $10,000, the amount sued for (R. 42). Withrow was entitled to re-

cover (a) $200 for the 0.11 of an acre permanently flooded, (b) $35 for the 0.04 of an acre intermittently flooded, and (c) $1,859.40 as the reasonable cost on September 22, 1938, of work which would have prevented erosion, and (d) six per cent interest from September 22, 1938. But the entire recovery should not exceed $3,500, the amount sued for (R. 42–43).

Judgment was entered for Dickinson for $6,538.06 ($4,720.63 with interest at the rate of six percent from September 22, 1938, to February 22, 1945, the date of judgment), together with interest at the rate of four percent until an appropriation was made to pay the judgment (R. 14). Judgment was entered for Withrow for $2,900.74 ($2,094.40 with interest at the rate of six percent from September 22, 1938, to February 22, 1945), together with interest at the rate of four percent until appropriation was made to pay the judgment (R. 29). Both judgments provided that, upon payment of the foregoing sums, the United States should be vested with the perpetual and full right and easement to use the lands between elevations 554.65 and 566 and with the perpetual easement intermittently to overflow the lands between elevations 566 and 574 (R. 15–16, 30–31).

The circuit court of appeals affirmed the judgments in all respects (R. 243–252).

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## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the respondents' causes of action did not accrue until September 22, 1938.

2. In holding that respondents could recover the cost of protective measures which, if installed prior to the raising of the water level, would have prevented all erosion and damage.

3. In holding that respondent, Dickinson, could recover compensation for lands which had been reclaimed by him.

4. In holding that an easement to overflow respondents' lands intermittently had been taken.

5. In admitting evidence as to the value of an easement to overflow intermittently respondents' lands, there being no showing as to frequency, duration, velocity or any other element of the alleged flooding.

6. In affirming the judgments of the district court.

## SUMMARY OF ARGUMENT

### I

A. The construction and operation of the dam gave rise to only a single cause of action in each of these cases. The fact that the pool was filled by distinct steps, each of which inundated a larger area of respondents' lands, does not change that conclusion. When, pursuant to law, the Government erects a permanent structure designed

and intended to flood lands to a predetermined elevation, it takes at one stroke all the property required to fulfill that intent. This view is supported by both federal and state decisions and is consistent with the policy of the law to put an end to litigation. Any other view would burden both the parties and the courts and would be inconsistent with the settled principle that cases such as these are founded upon contracts implied in fact.

B. The court below erred in holding that the causes of action did not arise until the pool reached its permanent elevation on September 22, 1938. The holding was based on the ground that until then the amount of land to be submerged could not be "established with certainty". Such is not the fact. When the dam began to impound water on October 21, 1936, it was plain that all lands in the pool up to elevation 566 would be submerged. This being so, no reason can be suggested why suits to recover just compensation should be delayed until the pool was filled.

C. When the Government began to operate the dam for the purpose of creating the pool, easements to flood the lands which were to be submerged were appropriated and causes of action for their value arose. *Portsmouth Co.* v. *United States*, 260 U. S. 327, 329; *Peabody* v. *United States*, 231 U. S. 530, 538. That date was October

21, 1936. Since the suits were brought more than six years later, they were barred by the statute of limitations. Sec. 24(20), Judicial Code; 28 U. S. C. 41(20).

D. At the very latest, the causes of action arose on May 30, 1937, the date when the cofferdam used for the first rise was replaced with gates and the water first reached respondents' lands. In principle, however, these facts create no legal distinction between the events of that day and those of October 21, 1936. If the causes of action did not arise until May 30, 1937, the suits as such are timely, but that of Dickinson must be dismissed because he acquired title on the following August 16. The right to compensation for a taking is a personal claim and, after it has once accrued, does not pass by a deed to the land. See, e. g., *Danforth* v. *United States*, 308 U. S. 271, 284. And, because of the prohibition of R. S. 3447, 31 U. S. C. 203, the claim could not be assigned to Dickinson.

E. Other possible views are demonstrably unsound. Some have been rejected by this Court. Others lead to absurd results or are obviously impracticable in application.

## II

A. Where it is practicable to protect private property from governmental action, the Government is not liable for the cost of protective measures or, if they are not undertaken, for the

damages which consequently result. See, e. g., *United States* v. *Lynah*, 188 U. S. 445, 474. In the present cases, the trial court found that the damage from erosion could have been prevented. It was error, therefore, to allow the recovery of the costs of such measures.

B. Prior to the erection of the Winfield Dam, the Government could submerge permanently lands up to elevation 554.65. And if, without raising the waters above that elevation, it undertook measures for the improvement of navigation which injured higher land, it would not have been liable therefor. In these proceedings, the United States is acquiring the right to submerge permanently lands up to elevation 566. In consequence of its use of these lands, others above that elevation belonging to the same owners have been damaged by erosion. The circuit court of appeals holds that, because the Government took a part of the land, it made itself responsible for these injuries.

That holding erroneously enlarges the measure of compensation for a partial taking. In that case, just compensation comprehends, in addition to the value of the part taken, the damages inflicted by the taking upon what is left. These damages must be paid in order to compensate the owner for what he has lost by the taking.

But under the Constitution the United States is not liable for damages *qua* damages. Therefore, it does not become liable to the former

owner for damages resulting from the use to which it puts the part it has taken. These damages are caused by action quite distinct from and subsequent to the taking. Since they would not be recoverable in the absence of a taking, they are not made so by the fact they follow a taking.

## III

The courts below held that respondent Dickinson was entitled to recover the value of 0.17 of an acre which he reclaimed after it had been submerged by the Government, although he could have prevented its inundation by making the same fill at an earlier time. If he had protected this land against being submerged, he would not have been entitled to its value or the costs of protection. He is in no better position because he reclaimed it.

## IV

A. In affirming awards to respondents for easements intermittently to flood between elevations 566 and 574, the circuit court of appeals stated that the dam had equipment capable of flooding to that elevation. There is no basis for the intended implication that the equipment was installed in order to enable the Government to overflow lands to that elevation. The Government will have no occasion to flood up to elevation 574. The water will rise to that height only if through some mischance the dam fails to operate accord-

ing to plan. The Government is not liable for the consequences of such a mishap.

B. Furthermore, the record contains nothing to indicate the frequency, duration or other characteristics of the supposed intermittent overflows. There was, therefore, no basis for the testimony as to the value of the easements nor for the awards made for them by the judgments. *United States* v. *Causby*, No. 630, Oct. T. 1945, decided May 27, 1946.

## ARGUMENT.

### I

### THE CAUSE OF ACTION IN EACH CASE AROSE PRIOR TO THE TIME WHEN THE WINFIELD POOL REACHED ITS PERMANENT ELEVATION

A. *The construction and operation of the dam gave rise to only a single cause of action in each case.*—Respondents took the position that although the flooding of their lands was accomplished by separate and distinct rises in the level of the Winfield Pool, there was but one taking and, hence, only a single cause of action accrued in each case. The Government was of the same opinion and so, also, were the courts below (R. 42, 246). The only alternative is to conceive of each successive rise in the water as a separate taking of the additional lands thereby submerged.[4] Thus, in the cases at bar, Withrow would have six

[4] In this view, the claims for intermittent flooding would be premature since it has never actually occurred.

causes of action, Dickinson five, and his predecessor in title one.

Research has not disclosed any federal decision expressly dealing with the question whether progressive or successive physical occupations of contiguous parts of a parcel of land under the power of eminent domain according to a single plan give rise to more than one cause of action. However, in *Court of Marion County, W. Va.* v. *United States,* 53 C. Cls. 120, it was held that a cause of action for the intermittent flooding of roads caused by a government dam accrued when the dam was completed and placed in operation and, in *Kincaid* v. *United States,* 37 F. 2d 602 (W. D. La.), affirmed *sub. nom. United States* v. *Kincaid,* 49 F. 2d 768 (C. C. A. 5), reversed on other grounds *sub. nom. Hurley* v. *Kincaid,* 285 U. S. 95, it was held that lands to be flooded by works to be constructed by the United States would be taken upon the completion of those works and that the cause of action for just compensation was not deferred until the land was actually overflowed. Thus, while the precise question presented here was not expressly decided, it is clear that under those decisions only a single cause of action arose when the dam was placed in operation, regardless of the manner or time in which the pool was filled.

Similarly, in *King* v. *United States,* 59 Fed. 9 (C. C. D. S. C.) appeal dismissed, 164 U. S. 703,

it was held, at least implicitly, that only a single cause of action accrued in the case of the gradual destruction of a rice plantation by waters percolating from the pool formed by a government dam. And in *District of Columbia* v. *Hutchinson,* 1 App. D. C. 403, 410, it was said that "when a public structure of a permanent nature is constructed by the public authority, and in the performance of the work private property is invaded and appropriated without the proper preliminary proceedings that would justify such appropriation, the owner of the property is entitled to his suit for the trespass, and the recovery of adequate damages; but the structure cannot be treated as a continuing nuisance, and one recovery will bar all subsequent suits and must be considered as the equivalent of what would have been awarded in the first instance as damages under condemnation proceedings."

State decisions dealing with the problem as one of eminent domain are generally in accord with this view. E. g., *Ipswich Mills* v. *County Commissioners,* 108 Mass. 363; *Call* v. *County Commissioners of Middlesex,* 2 Gray 232 (Mass.); *Davis* v. *New Bedford,* 133 Mass. 549; *Heard* v. *Middlesex Canal,* 5 Metc. 81 (Mass.); cf. *Louisville & N. R. Co.* v. *Bennett,* 196 Ky. 679; *City of Covington* v. *McKinney,* 263 Ky. 131.

In actions based upon related factual situations, where the construction and maintenance of

the dam or other structure has been treated as a continuing trespass or nuisance rather than a taking by eminent domain, the single cause of action rule has been applied in both federal and state courts when the structure causing the injury is permanent and was not built in a negligent or unskillful manner. *Gulf, C. & S. F. Ry. Co.* v. *Moseley,* 161 Fed. 72 (C. C. A. 8); *Hooker* v. *Farmers' Irr. Dist.,* 272 Fed. 600 (C. C. A. 8); *Hill* v. *Empire State-Idaho Mining & Developing Co.,* 158 Fed. 881 (C. C. D. Idaho); *Cotts* v. *Railroad Company,* 63 W. Va. 39; *City of Covington* v. *McKinney,* 263 Ky. 131; *Troy* v. *Cheshire Railroad Company,* 23 N. H. 83; *City of Stillwater* v. *Robertson,* 192 Okla. 395; cf. *New York Elevated Railroad* v. *Fifth Nat. Bank,* 135 U. S. 432, 440–441; *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334; and see the cases collected in Note, L. R. A. 1916 E, 997.[5]

While a number of exceptions to that rule are recognized in various jurisdictions, none of the grounds upon which they have been rested is present here. The location of Winfield Dam was fixed by law. Compare *Baltimore & P. Railroad* v. *Fifth Baptist Church,* 108 U. S. 317, and s. c., 137 U. S. 568, with *Richards* v. *Washington Ter-*

[5] While New York allows successive recoveries at law for recurring damages caused by an illegal structure, it does so on the theory that since the structure is illegal it is not to be presumed that its maintenance will be continued. *Uline* v. *New York C. & H. R. R. R. Co.,* 101 N. Y. 98.

*minal Co.*, 233 U. S. 546. Its physical characteristics are permanent. Cf. *Pickens* v. *Boom Company*, 58 W. Va. 11. It cannot be abated by injunction (*Hurley* v. *Kincaid*, 285 U. S. 95) nor by additional structures (cf. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334), and can be removed only if "labor be applied to change it." *Henry* v. *Ohio River R. Co.*, 40 W. Va. 234, 242. It is authorized by law. *District of Columbia* v. *Hutchinson*, 1 App. D. C. 403. It was built in the public interest (*Louisville & N. R. Co.* v. *Bennett*, 196 Ky. 679, 683) by an agency having the power of eminent domain (cf. *Hooker* v. *Farmers' Irr. Dist.*, 272 Fed. 600 (C. C. A. 8); *Louisville & N. R. Co.* v. *Bennett*, 196 Ky. 679). It necessarily and directly caused damage (cf. *Hill* v. *Empire State-Idaho Mining & Developing Co.*, 138 Fed. 881 (C. C. D. Idaho); *Skipwith* v. *Albemarle Soapstone Co.*, 185 Fed. 15 (C. C. A. 4), which was at once foreseeable, (*Norfolk & W. Ry. Co.* v. *Little*, 274 Ky. 681; cf. *Hooker* v. *Farmers' Irr. Dist.*, 272 Fed. 600, *supra*; *Skelly Oil Co.* v. *Humphrey*, 195 Okla. 384) to the respondents' lands rather than to their annual crops (*Gulf, C. & S. F. Ry. Co.* v. *Moseley*, 161 Fed. 72 (C. C. A. 8), according to the plan and design of the builder (*City of Stillwater* v. *Robertson*, 192 Okla. 395).

A rule based on the concept that each separate rise in the water level is a separate taking giving rise to a separate cause of action would be re-

pugnant to the policy of the law to put an end to litigation, would be burdensome to all parties as well as the courts, and would be impracticable in application. Thus, when, as often happens, the rises are more widely spaced, the statute of limitations would compel the bringing of more than one suit by a single plaintiff; or where, as here, the Dickinson land was sold between rises, two or more successive owners would be required to bring separate actions. Or, in the case of a large dam, such as Boulder Dam, which takes years to fill if filling progressed steadily, a landowner would be without relief until the dam was full, regardless of the damage done to him, while if the filling process were interrupted either by the Government for its own purpose or by the vagaries of rainfall and the melting of snow, suit could be brought for the damage then done but not for the inevitable prospective damage. In attempting to apply the rule, each separate small strip would have to be valued independently as of a different date and, perhaps, severance damage somehow computed five or six times. The burden on the United States in defending and on the courts in hearing such multiplied claims is obvious.

Furthermore, such a rule is inconsistent with the theory that actions such as these are founded upon contracts implied in fact. *United States v. Lynah*, 188 U. S. 445; *Tempel v. United States*, 248 U. S. 121. A contract, of course, results from the intentions and understanding of the

parties. Plainly, here, from the outset, the United States intended to fill the pool to its project elevation and all parties so understood. They also understood that the several rises were merely steps toward that ultimate goal. No one understood or believed that the Government ever intended to take less than that. In those circumstances, it is obvious that only a single contract could be implied in fact.

For these reasons, it is submitted that in each of these cases only a single cause of action arose out of the construction and operation of Winfield Dam.

B. *The cause of action in each case arose before September 22, 1938, the date when the pool reached its full elevation.*—The Government contends that the cause of action arose on October 21, 1936, when, with the aid of a cofferdam, the Winfield Dam began to impound water and raised the pool to elevation 547, or, at the latest, on May 30, 1937, when, all the gates having been installed and full operation having been made possible, the dam raised the pool to elevation 556, i. e., above the former water level at respondents' properties. If the causes of action arose on October 21, 1936, both suits were barred because they were not commenced until April 1943, more than six years later. Sec. 24(20), Judicial Code; 28 U. S. C. 41(20). If the causes of action did not arise until May 30, 1937, the suits as such would have been timely but Dickin-

son would not have been entitled to recover because he did not acquire title until the following August 16, since, as we shall show, *infra*, p. 38, only the owner at the time of the taking can recover compensation.[6]

Respondents asserted, however, that the taking was not complete until September 22, 1938, the date upon which the waters reached permanent pool level, and that the causes of action did not arise until that time. The lower courts so held (R. 41, 246–247). The circuit court of appeals based its holding on the ground that until the pool was raised to its permanent level the amount of land to be submerged could not be "established with certainty," and that "the whole matter was subject to government change and control" (R. 247).

There is no foundation in fact for the view that the amount of land which the Government would submerge could not be certainly established until the permanent pool level was reached. On the contrary, it was plain on October 21, 1936, when the dam began to impound water, that all lands up to elevation 566 would be permanently flooded. Summarized from the Statement (pp. 4–6, *supra*), the facts are as follows:

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[6] The time when the cause of action arose is also important in determining the date as of which the lands should have been valued, and the date from which interest should have been allowed. *United States* v. *Miller*, 317 U. S. 369.

Congress had authorized the creation and maintenance of a channel nine feet in depth for the length of the Kanawha River.[7] By the Act of July 3, 1930, 46 Stat. 918, 928, it had adopted a plan for such a channel in the part of the river which was upstream from the Marmet Dam. Thereafter, in order to provide the same depth of channel below Marmet Dam, it had authorized the erection of two more dams, one of which was to be at or near Winfield. Act of August 30, 1935, 49 Stat. 1028, 1035. The Winfield Dam was essential to the creation and maintenance of the nine-foot channel (R. 172). And under usual conditions a channel of this depth can be provided only by maintaining the water at Winfield Dam at elevation 566 (R. 187, 188). In July 1936, the Government notified those having structures in the river that it would raise the water to that elevation. And on October 21, 1936, the Government made the first of a series of methodical raises[8] which ended on September 22, 1938, when the pool reached its permanent level.

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[7] The legislative procedure for authorizing improvements for rivers and harbors is most deliberate. Congress expressly directs the making of preliminary examinations and surveys and prohibits any which it has not authorized. It adopts and authorizes projects only if the examination and survey result in a favorable recommendation by the Chief of Engineers. See *United States* v. *Arizona*, 295 U. S. 174, 189–190.

[8] As has been shown, p. 6, *supra*, the rise to elevation 547 (R. 20, 170) submerged Dam 8 and the rise to elevation 556 submerged Dam 7 (R. 38).

Thus, before October 21, 1936, the plan had been made to submerge the lands up to elevation 566. And on that day, as was shown by its action in beginning to impound water, it was manifest that the Government would carry out that plan. In the face of the foregoing considerations, it is plainly incorrect to say that uncertainty as to the extent of lands to be submerged persisted until the permanent pool level was reached; the contrary holding of the court below lacks support in fact.

And yet, unless there is uncertainty on this matter, no reason can be suggested for holding that a cause of action did not arise until the Government had filled the pool. Of course, a cause of action does not arise where there is no more than an administrative plan (*Bauman* v. *Ross,* 167 U. S. 548, 596–597; *Willink* v. *United States,* 240 U. S. 572, 579; *Poinsett Lumber & Mfg. Co.* v. *United States,* 91 C. Cls. 264) or where there is only legislation authorizing improvements (*Danforth* v. *United States,* 308 U. S. 271, 286; compare *Hurley* v. *Kincaid,* 285 U. S. 95, 103–104), which may not be made or can only be made after further action by Congress (*United States* v. *Sponenbarger,* 308 U. S. 256, 268), or where a dam which may never be completed has only been commenced. *Pitt River Power Company* v. *United States,* 98 C. Cls. 253, 255, certiorari denied, 319 U. S. 747. In such situations, the

United States is not committed to an undertaking and there is consequent uncertainty as to what, if any, private property it will take.

Here, however, the case was otherwise. Congress had authorized the building of Winfield Dam as part of an integrated plan to provide a nine-foot channel. Millions of dollars had been spent on dams upstream and on the Winfield Lock (R. 177). Without Winfield Dam the Locks would have been useless and navigation requiring the nine-foot channel provided by Marmet and London Dams would have been impossible (R. 171). The river was actually under control by reason of the Winfield Dam; and, by September 1, 1938, lands upstream from the dam and below elevation 565.5 were inundated, some by more than 20 feet of water. In the nature of things, there could have been no abandonment. Yet, the doctrine of the decision below would deny to the owners of lands then flooded any right to sue at that time because the Government planned to increase the pool level by a depth of six inches.* Clearly, such an injustice should not be worked without compelling reasons. No such

* If the holding below is literally applied, the pool would have to reach its permanent level before any landowner could sue for compensation. Thus, one whose land was completely inundated before that time could not yet sue. In cases where the pool fills only after a long time, it is manifest that owners would be subjected to much inconvenience and even to hardship.

reasons are set forth in the opinion below. We are confident that none exist.

Moreover, there is no authority in the disclosed cases to support the holding below. Reliance was placed upon *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120, and *Dooner* v. *United States*, 95 C. Cls. 392, but in fact those decisions support the position of the Government. Whatever ambiguity there may be in the opinion in the *Marion County* case is set at rest by the fact that the only dates to which the Court of Claims refers specifically are those when the pools "began to fill." 53 C. Cls. at 123. Since the Court of Claims did not even mention the dates when the final pool level was reached, or the length of time required to fill the pools, there is no basis for the conclusion of the court below that the Court of Claims intended to hold that the cause of action accrued at a time which can be neither found in nor computed from the opinion in the *Marion County* case. In its interpretation of the *Dooner* case, the court below was apparently misled by the statement in the opinion of the Court of Claims (95 C. Cls. at 399) that "on January 16, 1933, the defendant raised the level of the water and permanently submerged plaintiffs' land." Finding 13 (95 C. Cls at 397) shows clearly that on that date the gates of the dam were closed but that the pool level was not reached until February 2, 1933. Nevertheless,

the Court of Claims held (95 C. Cls. at 400) that the lands were taken on January 16, 1933.

It is submitted, therefore, that the court below erred in holding that the causes of action did not arise until September 22, 1938, when the project pool level was first reached.

C. *The causes of action arose on October 21, 1936, when operation of the dam commenced, and are therefore barred by limitations.*—It is our position that as soon as the United States began to use the Winfield Dam to execute the plan to create the pool, easements to flood the lands which were to be submerged were appropriated and causes of action to sue for just compensation were created. *Portsmouth Co.* v. *United States*, 260 U. S. 327, 329; *Peabody* v. *United States*, 231 U. S. 530, 538; *Jacobs* v. *United States*, 290 U. S. 13; *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120; *Dooner* v. *United States*, 95 C. Cls. 392, 399, 400; *Kincaid* v. *United States*, 37 F. 2d 602 (W. D. La.), affirmed *sub nom. United States* v. *Kincaid*, 49 F. 2d 768 (C. C. A. 5), reversed on other grounds *sub nom. Hurley* v. *Kincaid*, 285 U. S. 95.

The situation for both petitioner and respondents was in all respects comparable to that in *Portsmouth Co.* v. *United States*, 260 U. S. 327, *supra*. In that case, the United States had installed a battery of artillery in permanent emplacements on government-owned land. It had

built a fire-control station on the claimant's land. It was alleged that the guns could be fired only over plaintiff's land, that they had been fired on rare occasions,[10] and that the Government *intended* to fire them at will. On those allegations, this Court held that a cause of action had been stated, although it had twice held earlier (*Peabody* v. *United States*, 231 U. S. 530, *supra*, and *Portsmouth Co.* v. *United States*, 250 U. S. 1), in suits for the taking of the same lands by the same method, that a cause of action had not been established by showing the firing of the guns over plaintiff's land plus resulting damages. The decisive allegations in the third suit were that the United States was prepared to use the plaintiff's land and intended to do so at will. Here in the present case, the Government had shown an intent and purpose to impound water to the ultimate project elevation and landowners had been formally notified of that purpose. The Winfield Dam, a permanent structure, had been completed to the point where it could be and was being operated. It was designed, intended and, in its operation, required, to throw water on the lands behind it.

[10] As shown in the dissenting opinion (260 U. S. at 332–335), the earlier firing had become *res judicata* under the earlier decisions, while the more recent shooting had occurred after the suit was brought and, hence, could have no bearing on the question of whether a cause of action existed at that time.

The present situation is clearly distinguishable from *United States* v. *Sponenbarger*, 308 U. S. 256, and *Danforth* v. *United States*, 308 U. S. 271, where, on the facts, claims of taking were denied. In the *Sponenbarger* case, the floodway which was claimed to have taken the land was abandoned before completion and never placed in operation; the Government had not subjected the plaintiffs' lands to any additional flooding or increased the hazard of flooding. On those facts this Court held that the land had not been taken. The opposite situation obtains here. The dam was not abandonable but was actually in operation. Indeed, the facts here are analogous to those supposed by the circuit court of appeals to exist in the *Sponenbarger* case below, where that court held that there had been a taking. 101 F. 2d 506 (C. C. A. 8).

In the *Danforth* case, it was held that there was no taking because reduction of the levee height to fuse plug level, which would have subjected the plaintiff's land to increased flooding, had not been begun, and that the set-back levee, which had been completed, did not affect the land until after it was flooded by other causes. Here, however, the dam had made it certain that the land would be flooded as a direct result of its operation.

Instead, these cases come clearly within the rule assumed in *Peabody* v. *United States*, 231

U. S. 530, and adopted with approval in *Portsmouth Co.* v. *United States,* 260 U. S. 327, at p. 329, where it was said:

> * * * it was assumed in the first decision that "if the Government had installed its battery * * *, with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it * * *, whenever it saw fit * * *, with the result of depriving the owner of its profitable use; the imposition of such a servitude would constitute an appropriation of property for which compensation should be made." 231 U. S. 538. That proposition we regard as clearly sound.

In the second *Portsmouth* case, a few shells had been fired. But in the *Peabody* and first *Portsmouth* cases, that was held to be of no significance. The controlling factor which led to the different result in the last decision was the intent of the Government as to the future and the extent of the right which it intended to exercise.

In *Jacobs* v. *United States,* 290 U. S. 13, recovery was allowed for intermittent flooding caused and to be caused by a dam built by the United States. In that case, the district court had allowed recovery of interest from the date of the completion of the dam on the theory that that was

the date of taking. In affirming, this Court said (290 U. S. at 16):

> * * * The Government contemplated the flowage of the lands, that damage would result therefrom, and that compensation would be payable. A servitude was created by reason of intermittent overflows which impaired the use of the lands for agricultural purposes. 45 F. (2d) p. 37; 63 F. (2d) p. 327. There was thus a partial taking of the lands for which the Government was bound to make just compensation under the Fifth Amendment.

These cases show that when Congress has authorized a project which requires the acquisition of rights in specific private property for its operation, those rights are taken when the project is placed in operation. By so doing, the United States exposes the lands to the necessary consequences of the project operation. Thereafter, the use of the land is subject to the will of the United States. Hence, it is then that the owner loses the full dominion and control which he has previously enjoyed over his lands. It is then that the United States necessarily asserts the right in itself to use the property required for the operation of the project. It is that assertion which deprives the owner of his property. The property taken is property in the classical sense of the right to use

the land. To paraphrase the language of the *Peabody* and second *Portsmouth* cases, since the installation and operation of the dam had the purpose and effect of subordinating the strip of land between elevations 554.65 and 566 to the right and privilege of the Government to flow water directly across it whenever the United States saw fit, with the result of depriving the owner of its profitable use, the imposition of such a servitude constituted an appropriation of property for which compensation should be made. The Winfield Dam was put in operation on October 21, 1936, when it began to impound water. This being so, the servitude was imposed on that day and a cause of action to recover just compensation then accrued.

The court below apparently adopted and applied this reasoning in holding that the Government had taken easements intermittently to flood the lands lying between elevations 566 and 574 (R. 252). While these lands had not been subjected to any overflows, the court thought that the "construction of the dam with equipment capable of flooding the lands to the elevation of 574 feet indicate[s] an intent to subject the land to intermittent flooding and amount[s] to the taking of easements."[11] It is not evident, there-

[11] While we are of opinion that the lower court's conclusion as to intent resulted from misunderstanding the method of operating the dam (pp. 59–60, *infra*), we agree that construction of a dam capable of flooding lands intermittently and intended to be so used would constitute a taking of easements for that purpose.

fore, why the court below declined to hold that although lands to be intermittently flooded are taken as soon as the Government is capable of carrying out its intent, lands to be permanently flooded are not taken until the intent is accomplished. Accordingly, it is submitted that the causes of action arose on October 21, 1936, and that, since the suits were not brought within the next six years, they are barred by the statute of limitations.

D. *At the very latest, and in any event, the causes of action arose on May 30, 1937, when the entire dam was fully capable of operation; this would bar Dickinson, who acquired his land after that date.*—On that date the dam, now equipped with all its gates, raised the pool level to 556 feet, or 1.35 feet above the pre-existing water elevation at respond nts' lands. In principle, the Government cannot distinguish the events of that date from those which occurred on October 21, 1936. The circumstance that the cofferdam had then been replaced by gates is not significant, since the flooding of lands had already been accomplished by use of the cofferdam. Equally without significance is the fact that the rise of May 30, 1937, was the first to submerge part of respondents' lands. If up to this time the Government's intent had been obscure; this rise might have been evidence thereof. *Portsmouth Co.* v. *United States*, 260 U. S. 327, 329.

Here, however, the intent of the Government had long been manifest.

While the Government adheres to its contention that the taking could not have occurred later than May 30, 1937, it submits that the lack of distinction between the events of that date and those of October 21, 1936 strongly indicates that the taking occurred on the earlier date. In either event, Dickinson had no right to recover.

If the causes of action did not arise until May 30, 1937, the suits as such are timely but that of Dickinson must be dismissed because he did not acquire title until the following August 16. It is well settled that the right to compensation for a taking is a personal claim and, after it has once accrued, is not transferred by a deed to the land. *Danforth* v. *United States*, 308 U. S. 271, 284; *Ferrell* v. *United States*, 49 C. Cls. 222, 224; *Carpenter* v. *United States*, 56 F. 2d 828 (C. C. A. 2); 2 Nichols, *Eminent Domain* (2d ed. 1917), sec. 439, pp. 1151 *et seq.*; 2 Lewis, *Eminent Domain* (3d ed. 1909), sec. 517, p. 936. Compare *Roberts* v. *Northern Pacific Railroad*, 158 U. S. 1, 10; *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 596–597. Accordingly, the cause of action aganist the United States did not pass to Dickinson by the deed of his predecessor in title dated August 16, 1937. Nor could the claim be assigned to him. The provisions of R. S. 3477, 31 U. S. C. 203, make "absolutely null and void"

all transfers and assignments of unliquidated claims upon the United States. *United States* v. *Gillis*, 95 U. S. 407, 413 *et seq.* Thus, there is no basis upon which Dickinson can maintain the suit and its dismissal must be directed.

E. *If the rule for which the Government contends is rejected, only demonstrably unsound alternatives remain.*—Other events or points in time which conceivably could be taken to fix the date of taking are:

1. The view of the courts below that there was no taking "until the pool was raised to its permanent level" (R. 247);

2. The date of the acceptance of the dam from the building contractor;

3. The date when the dam was completed;

4. The date of the acquisition of the dam site;

5. The date when the most valuable and beneficial use of lands was rendered impossible;

6. The date when a particular plaintiff's land became completely submerged;

7. The date when substantial damage was first suffered by a particular plaintiff;

8. The date when a particular plaintiff first suffered damage;

9. The date when damage became visibly apparent.

10. The date when it became obvious that the dam would cause damage.

(1) The adoption of the "full pool" rule, the rule below, which would deny recovery to everyone owning lands within the pool area until the pool is filled, cannot be supported by reason or precedent. It would require the owner of lands lying at a low elevation, which had been completely flooded, to wait without remedy until the United States had taken other property in which he had no interest. In the case of a slow-filling dam, such as Boulder Dam, where the lake extends over 100 miles from the Dam and took some six years to reach the maximum operating level, a landowner might be required to wait for years after the flooding of his land was completed before he would have any remedy and, since interest is allowed only from the date of taking, he would be given no reimbursement for the long delay in payment. It would be absurd to say that his lands are not taken when they are flooded simply because the Government plans to flood them more deeply.

(2) Acceptance of the dam by the Government from the contractor obviously has no relation to the facts about which a landowner complains. In the first place, the Government may build a dam through its own agencies, in which event there would be no acceptance. Moreover, acceptance may be delayed for long periods of time by disagreement between the Government and the contractor over such questions as whether par-

ticular equipment installed by the builder measured up to the contract specifications. Plainly, it would be entirely unreasonable to deny relief to a landowner whose lands are completely submerged until the Government and the contractor settle or litigate a wholly collateral disagreement.

(3) Nor can a landowner be denied the right to sue until a dam which floods his land is completed. When the operation of a dam floods lands, the circumstance that the dam is not complete is clearly of no moment. On the other hand, the Government, conceivably, could complete a dam but plan not to use and operate it until some later time when a canal or a power plant which will use the water is constructed. In such a case, it would be unjust to the Government to hold that mere completion of the dam had the effect of taking lands which could be flooded by it.

(4, 5) It has been held in a case factually very similar to these, that the date of the appropriation of the dam site is the effective date, apparently because the most beneficial and valuable use for other lands of the same owner was rendered impossible by that event. *Waterford El. L., H. & P. Co.* v. *State of New York*, 208 App. Div. 273, 289, affirmed, 239 N. Y. 629. Such an effect upon an integrated land-holding would, of course, justify the allowance of large severance damages upon the taking of the dam site, but since

that event may be followed by complete abandonment of the project, the holding that the lands upstream were taken is inconsistent with the federal rule in such cases. *United States* v. *Sponenbarger*, 308 U. S. 256, 265; *Danforth* v. *United States*, 308 U. S. 271, 286. The extreme difficulty of determining what constitutes the destruction of the most beneficial and valuable use in any given case would seem to be a sufficient reason in itself for rejecting such a rule, but there is a more compelling reason. Plainly, the Government should not be held to have taken the land in such circumstances when the owner is left free to make all other less beneficial and valuable uses of which it is susceptible.

(6) The rule denying any relief until all of the lands of a particular plaintiff have been submerged (cf. R. 247), if that event should occur before the pool is filled, would make the question *whether* the Government has taken property depend upon accidents of ownership and, perhaps, on conveyances between other parties, rather than on any act of the United States. Thus, it would permit the owner of a small tract at a low elevation to be made whole while another owner of a similar tract, similarly flooded, who also owned contiguous lands within the pool area but not yet submerged, would be left without relief. However, the landowner in the second case could, by divesting himself of his title to

his uplands, thereby make the damage complete as to him and hence cause his right of action to mature.

(7) The rule that an owner may sue when he sustains substantial damage is obviously impracticable. In its application, it would be necessary to inquire whether the "substantial damage" is to be measured in terms of dollars or in terms of percentage of the total loss threatened. If measured by dollar value, even the total loss might not meet the test unless a very small amount were to be regarded as substantial. If percentage of total loss were the measure, a landowner sustaining an insignificant dollar loss could recover, while another sustaining many times that dollar loss would be denied relief.

(8) The rule that a landowner may sue for all his lands which will be flooded as soon as some part of the land is flooded would make the question of *what* the United States has taken depend upon accidents of ownership and, perhaps, transactions between parties other than the United States. Thus, in the case of the owner of a large parcel of land lying entirely within the pool area with a small part of it at a low elevation, full recovery of the value of the entire tract would be allowed when the small fraction is flooded. But if the same parcel were held by two owners, one owning only upland, only the other owner would be given relief. Yet, if the entire tract was taken

in the first instance, it was taken in the second case as well. Again, in the case of the two landowners, they could, by the device of a conveyance of one parcel to the owner of the other before the flooding commenced, or by consolidating their holdings in a tenancy in common, cause a right of action for the entire parcel to accrue against the United States when the first flooding occurred.

(9, 10) Some decisions have suggested that a cause of action does not accrue until the land of the plaintiff is "visibly affected", or "at the time it becomes obvious that a permanent injury has been suffered", or until "the full consequences" of the Government's action are "ascertained and realized". *Hooker* v. *Farmers' Irr. Dist.*, 272 Fed. 600, 603 (C. C. A. 8); *Skelly Oil Co.* v. *Humphrey*, 195 Okla. 384, 385; *King* v. *United States*, 59 Fed. 9, 12 (C. C. D. S. C.), appeal dismissed, 164 U. S. 703. The vagueness of such rules and the difficulties attending their application require their rejection. Thus, lands are, perhaps, "visibly affected" when put in peril of overflow by the operation of the dam; but conceivably they may not be visibly affected until the water actually encroaches upon them or until the water both invades and damages. If the encroachment of the water is determinative, then, in the case of any brief overflow after the construction of a dam is begun, a landowner must determine whether the flooding was caused by the

dam or by natural causes. Even if it should be determined that the dam was the cause, the fallacies of the "first damage" rule must then be accepted in any matter of less than total destruction. The same weaknesses infect the "obvious permanent injury" rule. The "full consequence" rule applied in the *King* case was expressly rejected by the Court of Claims in *Court of Marion County, W. Va.* v. *United States*, 53 C. Cls. 120, 147, 149, for the reason that

> A cause of action must arise out of some act or omission of the party to be charged and it is a perversion of usual rules to inject into it any element of personal selection on the part of the other party as to when it comes into being as the application of this rule would seem to do.

These manifest inconveniences which attach to every other conceivable alternative indicate the essential soundness of the rule urged here by the United States, that the commencement of operations gives rise to the cause of action for the taking.

If that rule is adopted here, both cases are barred by limitations, and there is no need to consider the other points argued in the brief.

If the Court rejects the rule urged by the United States, and holds that the cause of action for a taking did not accrue until May 30, 1937, the date when the dam was fully capable of operation, then Dickinson is barred, and it will not

be necessary to consider Point III herein; but Point II and IV remain applicable in respect of the judgment in favor of Withrow.

If the Court agrees with the ruling below, that the taking is not complete so as to give rise to a cause of action for a taking until the pool has reached its full level, then Point III is applicable to the judgment in favor of Dickinson, and Points II and IV are applicable to the judgments in favor of both respondents.

## II

### THE UNITED STATES IS NOT LIABLE FOR THE COSTS OF PROTECTIVE MEASURES WHICH, IF UNDERTAKEN BEFORE THE FLOODING, WOULD HAVE PREVENTED THE DAMAGES FROM EROSION

The court below erred in sustaining awards for the costs of protective measures which, if undertaken before the flooding commenced, would have prevented the erosion damages. These costs were not allowable as part of just compensation because (a) the United States is not liable for the cost of measures which are or could be undertaken to prevent damages, and because (b) in the case of a partial taking, just compensation does not embrace damages to the remainder of the land resulting from the use to which the part taken is put.

A. *The United States is not liable for the cost of measures which are or could be undertaken to prevent damage.*—Where it is practicable to protect private property from governmental action,

the United States is not liable for the cost of protective measures or, if they are not undertaken, for the damages which in consequence result. *United States* v. *Lynah,* 188 U. S. 445, 474; *Bedford* v. *United States,* 192 U. S. 217, 225; *Manigault* v. *Springs,* 199 U. S. 473, 484–485; *Southern Pacific Co.* v. *United States,* 266 U. S. 586, affirming 58 C. Cls. 428; *Mills* v. *United States,* 46 Fed. 738 (S. D. Ga.); *Salliotte* v. *King Bridge Co.,* 122 Fed. 378 (C. C. A. 6); *Kelley's Creek and N. W. R. Co.* v. *United States,* 100 C. Cls. 396, 412.

Thus, in *Mills* v. *United States,* 46 Fed. 738, *supra,* the court dismissed a suit brought to recover the cost of levees which Mills would have had to build to protect lands flooded above high water mark as a result of a dam put in the river by the Government. This Court approved the *Mills* decision in *United States* v. *Lynah,* 188 U. S. 445, saying (p. 474):

> Oviously, there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. The court rightly held that it could not be sustained.

Then, contrasting that situation with the one with which it was dealing, the Court added (188 U. S. at 474):

> Here there is no finding, no suggestion, that by any expense the flooding could be

> averted. We may, of course, know that there is theoretically no limit to that which engineering skill may accomplish * * *. But as a practical matter, and for the purposes of this case, we must under the findings regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.

Thus, this Court has held there can be no recovery for the expenses of preventing or repairing an injury. In the *Lynah* case, the record did not show that the lands could have been protected. But in the cases at bar, the findings are that the damage and erosion could have been prevented by measures which were economically justified (R. 40, 41).[12] Accordingly, it is submitted that the judgments awarding these expenses are erroneous and that the judgments sustaining the awards should be reversed.

B. *In the case of a partial taking, just compensation does not embrace damages to the remainder resulting from the use to which the part taken is put.*—The ruling that the United States must pay the cost of protective measures is further er-

[12] In *Kelley's Creek & N. W. R. Co.* v. *United States*, 100 C. Cls. 396, 412, the court denied recovery of costs of protective measures undertaken by the claimant, though conceding that, if the owner had not acted, there could have been recovery of the resultant damages and commented that this was a "strange result to reach." Since, however, as the *Lynah* case shows, recovery is denied whenever it is practicable to protect against overflow, the anomalous situation imagined by the Court of Claims cannot arise.

roneous in that it rests upon a misunderstanding of the obligations imposed upon the Government in the event of a partial taking of private property. This aspect of the holding is best approached by considering the situation that existed prior to the erection of the dam.

At that time, for purposes of navigation, the dominant power of the United States extended to the entire bed of the Kanawha River, which included all lands below ordinary high water mark. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 596–597. Indeed, so far as respondents' lands were concerned, this power extended above ordinary high water mark and to elevation 554.65, the level of the pool formed by old Lock and Dam No. 7. The district court so found (R. 41–42). Thus the United States had the right permanently to submerge the lands up to elevation 554.65. And if, without raising the waters above that elevation and so submerging respondents' lands, the United States undertook to improve navigability of the Kanawha River, it would not have been liable for lands washed away by change of the direction of the current (*Franklin* v. *United States*, 101 F. 2d 459, 463 (C. C. A. 6), affirmed on other grounds, 308 U. S. 516; *W. A. Ross Const. Co.* v. *Yearsley*, 103 F. 2d 589, 592 (C. C. A. 8), affirmed on other grounds, 309 U. S. 18), or by an increase of the current's velocity (*Bedford* v. *United States*, 192

U. S. 217, 225). For, as the cases just cited point out, an act done in the exercise of the Government's power to improve navigable rivers, which does not directly encroach upon private property, though its consequences may impair the use of such property, is not a taking within the Fifth Amendment. So much is conceded here by the circuit court of appeals (R. 248).

However, improvement of the navigability of the Kanawha River required that the waters be raised above the existing level. It was necessary to submerge respondents' lands up to elevation 566. Of course, the United States is obliged to pay the market value of these lands. And, having guaranteed to pay that value,[13] it is confirmed in its right to submerge them. But as a consequence of such submersion, the lands above elevation 566 have been damaged by erosion (R. 39, 41). As as just been pointed out, the Government would not have been liable for such damages had they resulted from an improvement which did not raise the water beyond elevation 554.65. It is submitted that, by acquiring the land up to elevation 566, the United States acquired the right to make improvements which did not raise the water beyond that elevation. Except on the basis of the holding below, no reason can be given why the Constitution imposes an

[13] As the assignments of errors show, we do not question the value placed upon the submerged lands by the district court.

obligation to pay compensation for damage resulting from the exercise of that right. That holding was to the effect that, when the United States takes a portion of a tract, it makes itself responsible for damages caused to the land remaining which result from the use to which the land taken is put (R. 248–250).

At this point, it is to be observed that the circuit court of appeals recognized that the erosion damages were not caused by the acquisition of the lands but by the use to which they were put (R. 248). As the district court found (R. 39, 41), the erosion was the direct and proximate result of the flooding of the lands up to elevation 566. Flooding, of course, constituted use of the lands. When, as here, the Government occupies lands without first instituting condemnation proceedings, actual ouster of the owners and use of the property are so coincident that at first blush it might seem that there is no distinction between acquisition and use. However, that coincidence in time does not warrant ascribing to acquisition effects which would easily be attributed to use if there were an appreciable time interval between the two. Thus, if, as the Government contends, the taking occurred as soon as the dam began to impound water or the first of respondents' lands were overflowed (pp. 25–37, *supra*), it is clear that flooding constituted use of the lands. It would have been equally clear if the

United States had instituted condemnation proceedings; in that event, the taking would have occurred when the United States acquired title by paying the award. *Danforth* v. *United States,* 308 U. S. 271, 284.

Further illustration may clarify the point. Let it be supposed that the lands in question had been needed by the Government for a use which did not involve flooding them. In that case, damage from erosion would not have occurred. The owners would have been entitled to the value of the lands taken and any diminution in the value of the remainder which resulted, for example, from loss of access to the river. But, of course, nothing would have been allowed on account of erosion. If, subsequently, the United States had flooded up to elevation 566, the flooding would have caused erosion. But the acquisition and use would then be so distinct that none would suppose that the acquisition caused the damage; and it would be plain that any claim for indemnity lacked constitutional support since the Fifth Amendment does not require compensation for damages as such. *Bedford* v. *United States,* 192 U. S. 217, 224; *Manigault* v. *Springs,* 199 U. S. 473; *Jackson* v. *United States,* 230 U. S. 1; *Cubbins* v. *Mississippi River Comm'n,* 241 U. S. 351; cf. *Richards* v. *Washington Terminal Co.,* 233 U. S. 546, 554.

It is true that in the case of the taking of a part of a tract of land, just compensation in-

cludes, in addition to the value of the part taken, the diminution in value of the remainder caused by the taking or "severance damages". *Bauman* v. *Ross*, 167 U. S. 548, 574; cf. *United States* v. *Miller*, 317 U. S. 369, 376. This follows because, by the taking, the United States deprives the owner of the difference in the value of his property before and after the taking, even though the value of the part acquired by the Government is less than that difference. Having received so much, the owner is not entitled to have more. *Campbell* v. *United States*, 266 U. S. 368, 371. He may not, in the absence of a taking, recover damages resulting from the use to which the Government puts the property taken. We submit that such damages do not become recoverable through the fact that they follow a taking. The circumstance that the United States must sue or be sued to satisfy its constitutional obligation for taking property may not be seized upon as an occasion for subjecting it to an additional liability for acts which of themselves would afford no ground for action. *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320, 326–327 (C. C. A. 6).

The court below relied on the statement in *United States* v. *Grizzard*, 219 U. S. 180, 183, that in a case of a partial taking the damage to the remainder for which compensation must be made embraces "injury due to the use to which the part appropriated is to be devoted". That re-

mark was quite unnecessary for the decision of the question there presented and its persuasiveness is still further lessened by events which followed its pronouncement. In *Archer* v. *United States,* 53 C. Cls. 405, the question of the liability of the United States for damages resulting to the remainder from the use of the part of an entire parcel of land which had been taken was squarely presented. The Court of Claims, "under the influence of the *Grizzard Case*", allowed a recovery but expressed doubt concerning its conclusion upon the point. Its judgment was affirmed by an equally divided Court. *Archer* v. *United States,* 251 U. S. 548. Plainly, therefore, this Court did not regard the earlier dictum in the *Grizzard* case as settling the law.

This Court considered but did not decide the question in *Sharp* v. *United States,* 191 U. S. 341, 352–354. The Court of Claims considered and rejected the proposition in *Court of Marion County, W. Va.* v. *United States,* 53 C. Cls. 120, 137–145. More recently, however, that view was adopted in *United States* v. *Chicago, B. & Q. R. Co.,* 82 F. 2d 131 (C. C. A. 8), and *United States* v. *Chicago, B. & Q. R. Co.,* 90 F. 2d 161 (C. C. A. 7), also relied on by the court below (R. 250). In the first of these cases, the court frankly stated (82 F. 2d 139): "As already forecast, to the word '*taking*' there has now been added by almost unanimous decision, bottomed on changes in the

organic law, or by statutes, or by judicial interpretation in the later cases, the words '[illegible]damaged' ".

It is submitted that the reasons urged above and those discussed in the *Sharp* and *Marion County* cases require rejection of the dictum in the *Grizzard* case. It follows that in the case of a partial taking, the constitutional obligation to pay just compensation does not require payment of damages caused to the remainder by the use to which the part taken is to be devoted. *A fortiori,* it does not require payment of the cost of preventing such damage; and the court below erred in holding otherwise.

## III

### THE UNITED STATES SHOULD NOT BE REQUIRED TO PAY DICKINSON THE MARKET VALUE OF SO MUCH OF THE LAND AS HE RECLAIMED

By raising the water to elevation 566, the United States submerged 0.22 of an acre of Dickinson's land. In 1940, he reclaimed 0.17 of an acre thereof. Nevertheless, the district court allowed him recovery of the value of all that which was once submerged. The circuit court of appeals sustained this allowance on the ground that at the time of the taking there arose an implied contract to pay and that the Government was not relieved of its obligation by subsequent

action of the owner. In our view this holding was error.

As has been shown (Point II, pp. 46–48 *supra*), if Dickinson had by protective measures prevented the Government from submerging this land, he could not have recovered its value. For then the fact would have been that he had retained his property and that the Government had not taken it. Neither could he have recovered the costs of preventing the taking. But it must also follow that if he could have protected his land from flooding and failed to do so, he is not entitled to recover either the value of the land or the cost of the protective measures, for then the flooding which occurred did not constitute a taking but instead was damage for which there is no constitutional liability. That was the precise holding in *Mills* v. *United States*, 46 Fed. 738 (S. D. Ga.), a decision which this Court expressly approved in *United States* v. *Lynah*, 188 U. S. 445, 473–474.

Here, Dickinson has reclaimed submerged land and thereby demonstrated the feasibility of its protection. The fact is that he has the land and that the Government does not use it. It cannot be said that the United States has permanently taken it. To pay him for what he still has does not give him just compensation; instead, it affords him unjust enrichment at public expense.

## IV

### THERE IS NO EVIDENCE TO SUPPORT THE AWARDS FOR THE VALUE OF EASEMENTS INTERMITTENTLY TO OVERFLOW RESPONDENTS' LANDS BETWEEN ELEVATIONS 566 AND 574

The circuit court of appeals affirmed the awards for the value of easements to flood intermittently the lands between elevations 566 and 574 on the grounds that "the acquisition of flowage easements in the vicinity and the construction of the dam with equipment capable of flooding the lands to the elevation of 574 feet indicate an intent to subject the land to intermittent flooding and amount to the taking of easements * * *" (R. 252). That holding, we submit, is erroneous because (a) the evidence shows that there was no intent to flood intermittently up to elevation 574, and because (b) there is no evidence to indicate the extent and value of easements to flood intermittently.

A. *The evidence shows that there was no intention to flood intermittently up to elevation 574.* The only evidence concerning overflows actually occurring above elevation 566 shows that during the ten-year period immediately preceding the time when the dam was placed in operation, elevation 574 was reached or exceeded 2.8 times per annum, while in the four years following that time, such overflows occurred only twice per annum (R. 191). There is no evidence whatever

of frequency of lesser overflows between the two elevations, either before or after operation of the dam was commenced. Plainly, liability cannot be imposed upon the Government unless it is at least shown that the frequency of the overflows between those elevations has been increased, cf. *United States* v. *Sponenbarger*, 308 U. S. 256, 266, or that the United States intends to increase their frequency.

The district court made no reference to the intent of the Government and seems to have taken the view that the liability of the United States is measured by the maximum result that can be produced through either the use or the misuse of the dam. Liability under the Tucker Act must be found either on an express or implied contract or upon the Constitution. Certainly there can be no implication of a contract by the United States to buy something it does not intend to use, nor can there be said to be a constitutional taking of something which the United States neither has physically seized nor intends to use. Thus, in *Creech* v. *United States*, 102 C. Cls. 301, certiorari denied, 325 U. S. 870, the question whether there had been a taking was determined not according to the results which were physically possible but according to the Government's plans of regulation. See, also, *Karlson* v. *United States*, 82 F. 2d 330, 333–336 (C. C. A. 8); *Horstmann Co.* v. *United States*, 257 U. S. 138; *Tempel* v. *United States*, 248 U. S. 121.

The circuit court of appeals, as has been shown, thought that the condemnation of such flowage easements over other lands, when coupled with the construction of the dam with equipment capable of causing such flooding, indicated an intent by the United States to flood respondents' lands intermittently to elevation 574. No finding to that effect had been made by the district court and the only evidence was that there was no intention to operate the dam to produce such a flooding (R. 189). Instead, it was shown that such a flooding would occur only in the event of a collapse of communciations, the failure of the operating machinery, or some similar cause which happens to coincide with a streamflow of 80,000 c. f. s. at the dam (R. 189, 194).

As the Statement discloses (pp. 9–12, *supra*), the United States will have no occasion to raise the pool to elevation 574. Maintenance of the nine-foot channel does not require such a raise. That depth can be provided by keeping the pool at the dam at elevation 566. Moreover, when, by reason of increase of natural flow, a lesser water elevation will suffice, the raising of the gates is begun. When the natural flow amounts to 80,000 cubic feet per second, the pool at the dam is at elevation 560 and the dam has ceased to operate and any flooding of lands results from natural forces. True, at this rate of flow the dam *can* partly operate and survive. And in such case the water in respondents' neighborhood would

rise to elevation 574. But that partial operation would result from mischance—a breakdown of communications or a failure of the lifting machinery. Thus, only in the sense that the dam is capable of surviving a mishap can it be said that it has equipment capable of flooding the lands to elevation 574. Obviously, this consideration does not justify a holding that the equipment was installed for the purpose of intermittently flooding the lands between elevations 566 and 574. It is equally plain that any flooding in these areas which will occur by reason of the construction of the dam will result from acts or omissions on the part of the Government which at most could be attributed to negligence on the part of its agents or employees. It is well settled that the United States in such situations is not liable for the consequent damage. *Sanguinetti* v. *United States,* 264 U. S. 146, 149–150; *Keokuk and Hamilton Bridge Co.* v. *United States,* 260 U. S. 125; *Horstmann Co.* v. *United States,* 257 U. S. 138, 146.

Furthermore, it was also shown that the stream flow of 80,000 c. f. s., which combined with the mechanical failures might cause flooding to elevation 574, would flood respondents' lands to elevation 572.1 even under open river conditions. As it was aptly stated in the testimony, "if Winfield Dam were not in existence the water would naturally and normally rise to elevation 572.1 on the Dickinson property" (R. 190). Thus, it appears that even if the Government had an in-

tent to bring about the condition which would raise the water to elevation 574 (which it steadfastly denies), the effect of its operation would be to inundate only those lands between 572.1 and 574 and not the entire strip above 566. Nevertheless, the courts below held that the Government should be required to pay for the entire strip. Plainly, the United States has no constitutional obligation to compensate respondents for the flooding to elevation 572.1 which natural causes will bring about in any event.

Accordingly, it is submitted that there is no evidence that the Government intends intermittently to flood the lands between elevations 566 and 574. And, as must follow, there is no support in the record for the holding that the United States has taken easements between these elevations.

B. *There is no evidence to indicate the value of easements to flood intermittently.*—While the foregoing disposes of this aspect of the cases at bar, it is to be noted that, as the Statement also discloses (p. 10, *supra*), the record contains nothing to indicate the frequency, duration, or other characteristics of the supposed intermittent overflows. When regard is had to the fact that only upon a consideration of these factors could there be a determination of the consequent diminution of the value of respondents' lands, it is obvious that there was no foundation for testimony as to just compensation therefor. Accord-

ingly, any attempts to give evidence on this matter should have been rejected. *Harten* v. *Löffler*, 212 U. S. 397, 405.

However, if it could be assumed that those attempting to testify could fill the void with hypotheses of their own (e. g., that the lands would be under water one, ten, or a hundred days of the year), they did not—so far as the record shows—do so here. Nor is there anything which indicates that, in making the awards, the trial court had any standards in mind. It can only be said that the awards do not exceed the range of speculation of the witnesses who were permitted to testify.

It is clear, therefore, that there is no basis, factual or hypothetical, for testing the awards for intermittent flowage easements. An award similarly deficient was recently disapproved by this Court. *United States* v. *Causby*, No. 630, Oct. T., 1945, decided May 27, 1946.

Since there is no evidence that the Government intends to flood intermittently the lands of respondents between elevations 566 and 574, and since, moreover, there is nothing to indicate the value of easements for this purpose, it is submitted that so much of the judgments as purport to award just compensation for intermittent flowage easements must be reversed in any event.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court below should be reversed.

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OCTOBER 1946.

## APPENDIX

Section 24 of the Judicial Code, 28 U. S. C. 41, provides in pertinent part as follows:

> The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * *. No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane per-

sons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

The material portion of R. S. 3477, as amended, 31 U. S. C. 203, provides:

> All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *

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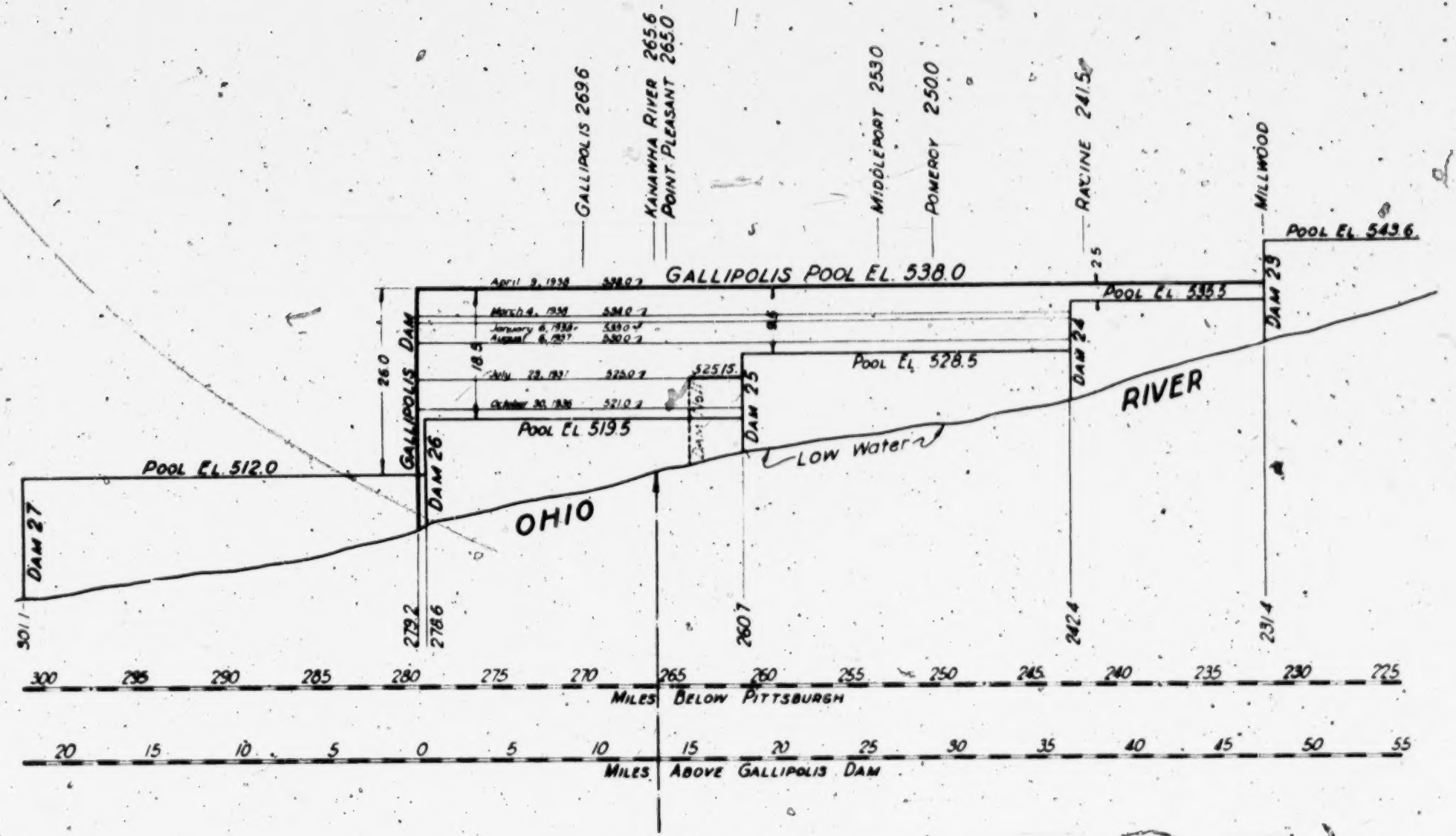
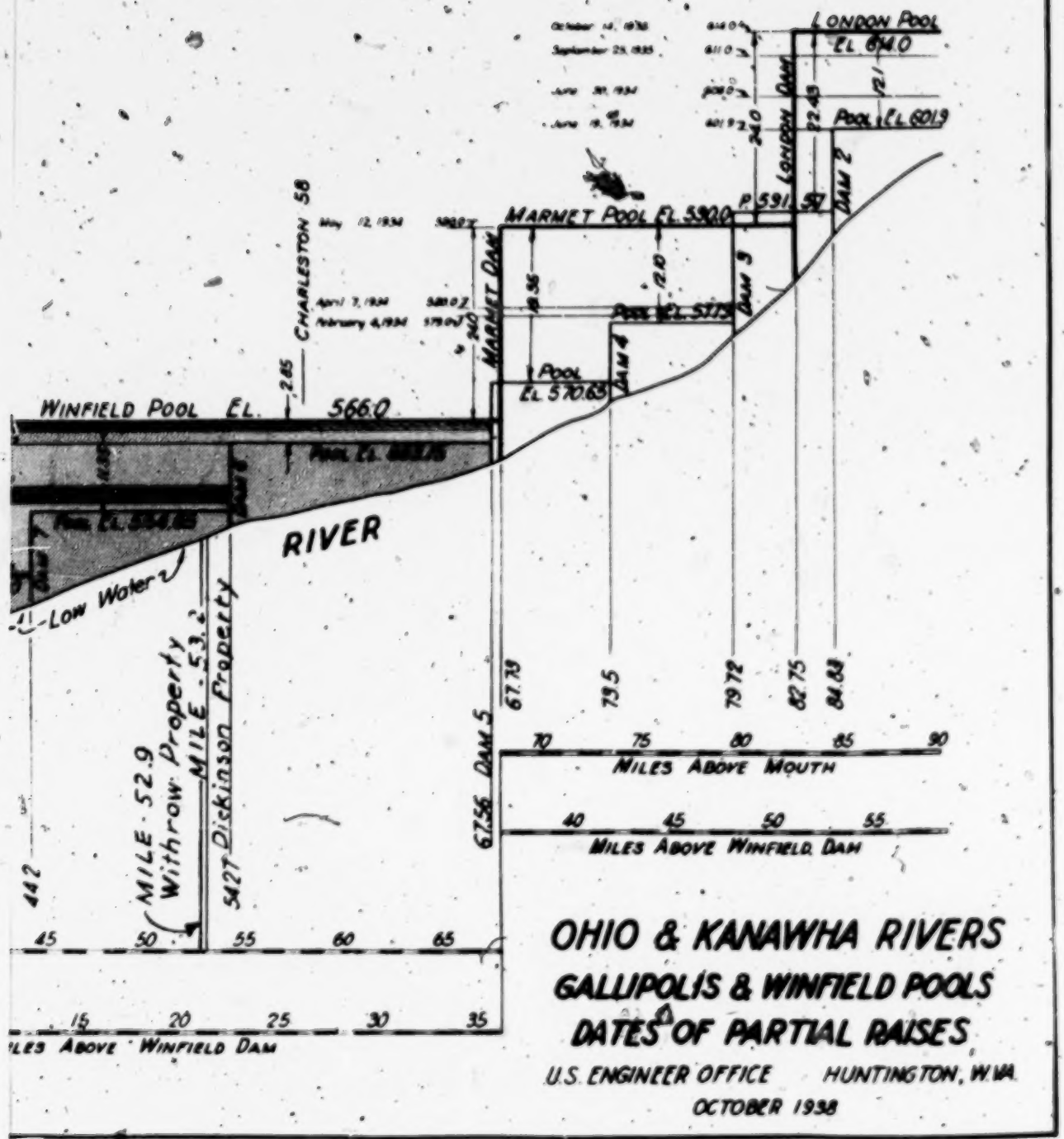

GALLIPOLIS 2696
KANAWHA RIVER 265.6
POINT PLEASANT 2650
MIDDLEPORT 2530
POMEROY 2500
RACINE 241.5
MILLWOOD
POOL EL 543.6
GALLIPOLIS POOL EL. 538.0
POOL EL 535.5
POOL EL 528.5
POOL EL 519.5
POOL EL 512.0
GALLIPOLIS DAM
DAM 26
DAM 25
DAM 24
DAM 23
DAM 27
OHIO RIVER
Low Water
26.0
18.5
25
279.2
278.6
260.7
242.4
231.4
301.1
300 295 290 285 280 275 270 265 260 255 250 245 240 235 230 225
MILES BELOW PITTSBURGH
20 15 10 5 0 5 10 15 20 25 30 35 40 45 50 55
MILES ABOVE GALLIPOLIS DAM


LONDON POOL
EL. 644.0
LONDON DAM
POOL EL. 601.9
DAM 2
MARMET POOL EL. 590.0
MARMET DAM
DAM 3
POOL EL. 577.5
DAM 4
POOL EL. 570.63
CHARLESTON 58
WINFIELD POOL EL. 566.0
RIVER
Low Water
MILE · 52.9
Withrow Property
MILE · 53.2
Dickinson Property
DAM 5
67.56
67.79
79.5
79.72
82.75
84.83
MILES ABOVE MOUTH
MILES ABOVE WINFIELD DAM
OHIO & KANAWHA RIVERS
GALLIPOLIS & WINFIELD POOLS
DATES OF PARTIAL RAISES
U.S. ENGINEER OFFICE HUNTINGTON, W.VA.
OCTOBER 1938

## COLOR LEGEND

LEVEL AT OLD SYSTEM OF DAMS

RISES IN ELEVATION BEHIND WINFIELD DAM

| | | |
|---|---|---|
| | 10-21-36 | 547' |
| | 5-30-37 | 556 |
| | 10-20-37 | 558 |
| | 1-6-38. | 563.15 |
| | 8-26-38 | 565 |